Supreme Court, U.S.
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No. 97-961

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1997

JAMES J. CONDIT, JR., et al.,

Petitioners,

v.

HAMILTON COUNTY, OHIO, et al.,

Respondents.

On Petition For A Writ Of Certiorari
To The Hamilton County Court of Appeals
First Appellate District Of Ohio

PETITIONERS' REPLY BRIEF

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PRELIMINARY COMMENTS

This is a summary judgment proceeding. There are no disputed facts before this Court. The relevant court orders were stipulated into the record and appear as Appendices F and G of the Petition. The Petitioners' innocence and the evidence that they were arrested while complying with Judge Crush's Preliminary Injunction ("Injunction") is likewise undisputed. This Court must not be misled into thinking otherwise.

The greatest danger of error is posed by the Respondents' insistence that they acted "in accordance with" the court order (City's Brief at 2), "solely because of and in obedience to that order" (County's Brief at 21) or "pursuant to and in conformity with a valid order" (County's Brief at 21). Such assertions are false, and are nothing but "spin" from the wrongdoers.[1]

Petitioners will reinforce this point with the most obvious example of unrebutted evidence that Respondents violated the Order to the Sheriff ("Order"). The Injunction had to be served upon an individual as a prerequisite of class membership, and only class members were enjoined. Likewise, the Order required service of the Injunction. Yet, seven of these Petitioners were arrested without being served[2], a direct violation of the Order and the legal equivalent of arresting innocent people who had committed no

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[1] Likewise, Respondents comments suggesting that Petitioners were linked to "imminent violence" (County Brief at 10) or were "violators" of the Injunction (County Brief at 11) are at best diversionary and at worst deliberately misleading.

[2] The record contains uncontradicted affidavits by Petitioners Tidwell, Miller, Spry, Cynthia Conklin, David Conklin, Gerald Taylor and Kathleen Engel that they were arrested without ever receiving a copy of the Injunction.

crime and were unrelated to any litigation.

No matter how many times the Respondents say otherwise, and notwithstanding the Court of Appeals' opinion[3], the facts are the facts, they are in this record, and the Petitioners have stated them correctly. The Respondents *violated* the Order when they arrested twelve innocent people who had never been served and/or were complying with the Injunction. Accordingly, the Petition presents pure issues of law regarding the proper application of the immunity doctrines.

(A) PETITIONERS' REPLY ON THE IMMUNITY ISSUES.

1. There Is No Absolute Judicial Immunity For Cities and Counties.

Respondents cited only two cases for the proposition that cities and counties, as governmental entities, can benefit from the absolute immunities normally available only to government officials: *Doe v. McFaul*, 599 F.Supp. 1421 (N.D. Ohio 1984) (judicial immunity) and *Pugh v. Parish of St. Tammany*, 875 F.2d 436 (5th Cir. 1989) (prosecutorial immunity). In fairness to both courts, *McFaul* and *Pugh* pre-dated this Court's guidance in *Leatherman v. Tarrant County Narcotics Unit*, 507 U.S. 163 (1993). It is not surprising, however, that neither court provides *any* analysis on the individual/governmental distinction before generously showering individual immunities upon governmental entities. Nor does either court cite case law to support a theory for

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[3] The Court of Appeals did not even bother to mention in its Opinion that seven of these Petitioners were arrested without being served with the Injunction, yet it upheld summary judgment against them while concluding that there was insufficient evidence that Respondents had acted "beyond the judge's order" (Appendix to Petition at p. 10a), whatever that means.

absolute governmental immunity.

The County Respondents characterized this Court's instruction in *Leatherman* as "dicta" which is "unpersuasive". County Brief at 18. One wonders what the Respondents would find persuasive, if not a unanimous opinion of this Court. Only those intent on misreading *Leatherman* could conclude that counties or cities can benefit from absolute judicial immunity, or any other personal immunity. It is, therefore, no surprise when courts drawing that conclusion can not support it with any meaningful case law.

2. There Is No Absolute Judicial Immunity For Violators of a Judicial Order.

The individual Respondents argue that they are entitled to absolute (quasi-)judicial immunity. Their entire argument is based on the fallacious premise that they complied with the Order. None of the case law cited by Respondents stands for the proposition that law enforcement officials can violate the judicial order which they are charged with enforcing and still benefit from absolute immunity. Nor did the Court of Appeals address that issue, except to create confusion by stating that "the propriety of extending immunity is enhanced by the fact that the order at issue has been held to be valid." Appendix to Petition at p. 10a. Petitioners assume that the "order at issue" means the underlying injunction which was upheld in *Planned Parenthood v. Project Jericho*, 52 Ohio St.3d 56, 556 N.E.2d 157 (1990), a decision which has nothing to do with the Respondents' agreement with Planned Parenthood which caused the wrongful arrests at issue in this case.

(B) PETITIONERS' RESPONSE TO RESPONDENTS' OTHER ARGUMENTS FOR DENYING PETITION.

1. Supreme Court Jurisdiction.

The County argues that this Court lacks jurisdiction to grant the Petition. The County's misdirected argument is really an attack on the merits of the issues raised in the Petition. The procedural history of this case very clearly satisfies the certiorari jurisprudence of this Court, which will consider exercising jurisdiction when:

> A state court or United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Supreme Court Rule 10(c).

Substantively, the immunity issues raised in the Petition satisfy Rule 10 for three reasons. First, the disposition by the Court of Appeals which awarded absolute judicial immunity to the City and the County is a misstatement of law and *not* "the misapplication of a properly stated rule of law." Supreme Court Rule 10.

Second, the distinction between individual immunities and municipal immunities are of such importance that this Court has been periodically moved to discuss them in other cases which, at their core, presented other issues. See *Kentucky v. Graham*, 473 U.S. 159 (1985) and *Leatherman v. Tarrant County Narcotics Unit*, 507 U.S. 163 (1993). Yet, as clear as this Court was in both *Graham* and *Leatherman*, lower courts are apparently still missing the point. Contrary to the County's suggestion, therefore, the

Petition presents this Court with an opportunity to settle an important principle for §1983 litigants: that governmental entities such as cities and counties are not entitled to benefit from the individual immunities which flow from the acts of judges.

Finally, if the Court of Appeals opinion in this case does not conflict with a prior holding of this Court, it certainly conflicts with "relevant decisions of this Court", Supreme Court Rule 10, such as *Leatherman* and *Graham*.

2. The Record Supports City and County Liability Under 42 U.S.C. §1983.

To prove a claim under 42 U.S.C. §1983, a plaintiff must allege: (1) "that some person has deprived him of a federal right," and (2) "that the person who has deprived him of that right acted under color of state or territorial law." *Gomez v. Toledo*, 446 U.S. 635, 640 (1980). Neither of these elements is challenged by Respondents, nor were they ruled upon by the lower courts.

However, both the City and the County suggest alternative reasons why they, as governmental entities, can have no liability in this case. Petitioners have the burden of establishing that the governmental entities had a policy or custom which was the moving force behind the violations. *Monell v. Department of Social Services* 436 U.S. 658 (1978); *City of Canton v. Harris* 489 U.S. 378 (1989). Petitioners submit that the *stipulated* evidence easily meets that burden.

(i) COUNTY LIABILITY

County liability rests squarely on *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986), because Sheriff Stokes and his whole chain of command were direct participants in the arrest scheme which caused the arrests. There is no doubt that in Ohio the county sheriff is not only a county official but the "chief law

enforcement officer of the county." *Id.* at 476 (citing *Pembaur v. City of Cincinnati*, 74 F.2d 337 (6th Cir. 1984)). The County knows this to be correct and does not suggest otherwise. Indeed, Petitioners submit that the County's liability under *Pembaur* is so obvious, based on the Sheriff's direct involvement in the arrests, that if the Court of Appeals is reversed on the immunity issue the only proper result on remand will be summary judgment in favor of Petitioners and against the County.

The County does not even mention *Pembaur*, relying instead on the theory that a Common Pleas Judge in Ohio is a state official rather than a county official, and that it was therefore State policy (i.e., the judicial order) which was the moving force behind the arrests in this case. Such an argument assumes the one fact that the County would like to prove (i.e., that there was no County policy at work) and ignores the role of the Sheriff in setting up the arrest procedure with Planned Parenthood.

The most telling aspect of the County's Brief is its references to Planned Parenthood's "responsibilities" on the day of the arrests. County Brief at pp. 8, 20. This Court will search in vain throughout the Injunction, the Order or the entire record for any role assigned to Planned Parenthood by Judge Crush. Planned Parenthood had no role until the Sheriff gave away his discretion and "responsibilities" for enforcing the Injunction. Thus, the more appropriate principle for deciding the "state policy vs. county policy" argument appears in *Garner v. Memphis Police Dept.*, 8 F.3d 358 (6th Cir. 1993), where the Defendants claimed that they had no choice but to follow a state statute. The 6th Circuit rejected that argument after observing that the Defendants in *Garner* "did exercise their freedom to choose a more restrictive policy" than the state statute, a choice which constituted "a deliberate choice from among various alternatives under *Pembaur*". *Garner* at 364.

Likewise, the County in this case chose from a multitude of enforcement options and made the incredible decision to rely on

Planned Parenthood to determine who should be arrested. The County simply can not blame Judge Crush for its own ill-conceived plan which led to the arrests of twelve innocent people.

(ii) CITY LIABILITY

The City Respondents argue that Joseph Martin (the only Petitioner with claims against them) "is unable to establish the requisite elements for liability under 42 U.S.C. §1983 for both the City and the individual Defendants", City Brief at 4, but limit their argument to the immunity of police officers Hudson and Cain (City's Brief at 10-11) and a largely irrelevant review of municipal liability theories. (Id. at 4 -9)

City liability in this case rests on the City's *stipulation* that officers Hudson and Cain arrested plaintiff Joseph Martin *pursuant to the policies, customs, training and instruction of the City of Cincinnati and the City of Cincinnati Police Division*. This is tantamount to an admission of liability once a constitutional violation has been established. The City failed to address this point at all in its brief, but instead wasted a lot of time discussing respondent superior, failure to train, deliberate indifference, and other issues relating to municipal liability under 42 U.S.C. §1983. Once the City stipulated that its arresting officers acted pursuant to the policies and customs of the City, there was no need for Petitioners to pursue discovery of City leaders attempting to prove theories already encompassed within the stipulation.

A final comment is needed regarding *Bachelier et al., v. Hamilton County, et al.*, No. 90-3725 (6th Cir. April 30, 1991; unreported), an opinion which appears as an Appendix to the County's Brief and was discussed by both the County and the City in their briefs. Contrary to the City's Brief at p. 7, *Bachelier* had nothing to do with these arrests or any other arrests. The theory of

Bachelier, brought on behalf of individuals who (except for a few) always complied with the Injunction, was that Judge Crush's Injunction was unconstitutional, and that Hamilton County was liable for the First Amendment violations because the Sheriff (a policy-making official for the County) elected to enforce it. While *Bachelier* was pending in the District Court on June 20, 1990, the Supreme Court of Ohio upheld the Injunction in *Planned Parenthood v. Project Jericho*, 52 Ohio St.3d 56, 556 N.E.2d 157 (1990). The Sixth Circuit upheld the dismissal of *Bachelier* on preclusion grounds and also because the County had done nothing more than enforce a valid court order.

Bachelier , with which Petitioners disagree for reasons not readily apparent in the unpublished opinion, is worth discussing here if only because of its contrast with this case. In *Bachelier*, the Sheriff did what he was ordered to do by enforcing the Injunction of a state court judge. In this case, the Sheriff went a step further by delegating his enforcement discretion to Planned Parenthood and then arresting people who should never have been arrested based upon the explicit terms of the Order. The true "moving force" behind the arrests in this case was clearly the decision of the Sheriff, and not the orders of the judge.

(C) PUBLIC POLICY CONSIDERATIONS

There is a public policy consideration which underlies Petitioners' argument that cities and counties should not benefit from absolute judicial immunity even if the individual officials do: separation of powers. Do we not want a certain tension to exist between the judicial and executive branches of government? If a judge afflicted by bias, corruption, mental illness or some other cause substantially overreaches his authority and/or orders conduct which is clearly unlawful and harmful to innocent people, is it not *desirable* for policy making officials in the law enforcement area to question such orders? If the judge in *Mireless v. Waco*, 502 U.S. 9 (1991), for example, issued a standing order for the Sheriff to

"seize with excessive force" all attorneys late for court appearances, would we not want the Sheriff (or other policy makers) to question that order, and to refuse to execute it? Maybe we should not hold hapless individuals responsible for executing clearly unconstitutional court orders, but when the executive branch of government is willing to go along as a matter of policy or custom, such immunity is neither necessary nor desirable. It is for this reason that *Leatherman's* "dicta" is correct and this case was wrongly decided by the Ohio courts.

CONCLUSION

For the foregoing reasons, the Petition for a writ of certiorari should be granted.

Respectfully submitted,

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